Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-122

In The
Supreme Court of the United States
October Term, 1986

ROBERT M. THOMPSON,

Appellant,

v.

JOAN E. THOMPSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

MOTION OF APPELLEE JOAN E. THOMPSON TO DISMISS [or AFFIRM]

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9 pp

TABLE OF CONTENTS

Page

STATEMENT OF FACTS 1

ARGUMENT:

1. APPELLANT FAILED TO PROPERLY RAISE THE QUESTION OF WHETHER SECTION 5124 VIOLATES THE FEDERAL CONSTITUTION 2

2. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL SINCE THE STATUTE UNDER ATTACK BY APPELLANT NO LONGER EXISTS 3

3. NEITHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT NOR ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION ARE VIOLATED BY SECTION 5124 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Page

Home Building and Loan Assoc. v. Blaisdell, 290 U.S. 398 6

In Re Marriage of McDonough (1986), 183 Cal. App.3d 45, 227 Cal.Rptr. 872 4

Konigsbery v. State Bar of California, 366 U.S. 36, 44 4

McCarty v. McCarty (1981), 453 U.S. 210 ..... 1, 3, 5

Mueller v. Walker, 167 Cal.App.3d 600, 607, 608, 609 ..... 2, 4

Statutes

AMENDMENT V
United States Constitution 2, 4

ARTICLE I, Section 10
United States Constitution 2, 4, 5

California Civil Code
Section 5124 ..... 2, 3, 4, 5, 6

Federal Uniformed Services Former Spouses Protection Act (FUSFSPA)
10 U.S.C. Section 1408 1

Appellee, JOAN E. THOMPSON, hereby moves to dismiss [and/or affirm] the within appeal on the grounds that it does not present a substantial Federal question; that the Federal question sought to be reviewed was not timely and properly raised in the Court below; and that the questions presented are so unsubstantial as not to need further argument.

———o———

STATEMENT OF FACTS

The parties to this appeal were married on Christmas day in 1955. A final judgment of dissolution of that marriage was entered in California on August 28, 1981. That final judgment awarded Appellant's military pension to him as his sole and separate property, pursuant to this Court's decision in *McCarty v. McCarty* (1981) 453 U.S. 210. The Interlocutory Judgment of Dissolution of Marriage specifically provided that "the Court specifically reserves jurisdiction over the parties and the division of assets as set forth above to ensure compliance". The *McCarty* decision was issued approximately two months prior to the entry of the final judgment of dissolution in this action.

Thereafter, Congress passed the Federal Uniformed Services Former Spouses Protection Act ("FUSFSPA"; 10 U.S.C. Section 1408) which became effective February 1, 1983. Three days after the effective date of FUSFSPA, Appellee filed a Notice of Motion for Modification in the trial court, seeking an order giving her the benefits of FUSFSPA by modifying the decree of dissolution to provide that Appellant's military retirement was a community

property interest. The formal order granting Appellee's motion for modification in the trial court was filed and entered July 1, 1983.

California Civil Code Section 5124 (hereafter referred to as "Section 5124") became effective on January 1, 1984.

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ARGUMENT

1. APPELLANT FAILED TO PROPERLY RAISE THE QUESTION OF WHETHER SECTION 5124 VIOLATES THE FEDERAL CONSTITUTION.

In his Opening Brief to the California Court of Appeal, Appellant failed to assert the position which he currently takes before this Court, i.e. that Section 5124 amounts to an impairment of contract in violation of Article I, Section 10 of the United States Constitution and/or amounts to a denial of due process under the Fifth Amendment to the United States Constitution.

Although that Opening Brief was filed more than five months after the effective date of Section 5124, Appellant declined to even mention the existence of Section 5124 in his Opening Brief, much less assert that it was unconstitutional. Before that Opening Brief was filed, a California Court of Appeals decision holding Section 5124 to be constitutional was published. *Mueller v. Walker*, 167 Cal.App.3d 600.

Since Appellant elected to forego any discussion of Section 5124 in his Opening Brief on Appeal and, specifical-

ly, failed to assert or discuss the constitutionality of that statute, both the California Courts and this Court would be justified in simply ignoring Appellant's eleventh hour arguments regarding the constitutionality of that statute.

2. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL SINCE THE STATUTE UNDER ATTACK BY APPELLANT NO LONGER EXISTS.

Section 5124 expired by its own terms on January 1, 1986. Both the language of the statute on its face and the cases interpreting it indicate clearly that the statute was designed to prevent the inequity of treating those spouses whose dissolution decrees became final in California between the effective date of the *McCarty* decision (June 26, 1981) and the effective date of FUSFSPA (February 1, 1983) differently than those military spouses whose dissolution decree became final before *McCarty* and after FUSFSPA.

Since Section 5124 was in existence for only two years and since it was repealed by its own terms January 1, 1986, neither the statute itself nor any decisions by this Court (or any other court) or its constitutionality will have any prospective effect on any litigants.

Although the instant case cannot be characterized as "moot" as between Appellant and Appellee here, the fact that Section 5124 has been repealed by its own terms eliminates any general interest or importance in its constitutionality.

3. NEITHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT NOR ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION ARE VIOLATED BY SECTION 5124.

Appellant asserts that Section 5124 violates the due process clause of the Fifth Amendment of the Constitution of the United States in that it violates the principles of res judicata by providing that a final judgment can be reopened to provide for the equitable distribution of marital property upon dissolution of the marriage.

> Absent an indication of any purpose upon the part of the state authority (whether legislative or judicial) to evade some prior decision of the United States Supreme Court or federal Congress, the principles of finality protecting the parties to this litigation (res judicata or collateral estoppel) are, within the broad limits of fundamental fairness, solely the concern of state law. (*Konigsberg v. State Bar of California,* 366 U.S. 36, 44 . . .)

Mueller v. Walker, 167 Cal.App.3d at p. 607

By making Civil Code Section 5124 retroactive, the California legislature was simply modifying its own res judicata rules to serve the state's overriding public interest in the equitable distribution of marital property upon dissolution of marriage. This is exactly what congress intended to allow the states to do by the passage of FUSFSPA. In Re *Marriage of McDonough* (1986) 183 Cal.App.3d 45, 227 Cal.Rptr. 872.

The California Court of Appeal succinctly dealt with the same due process argument as is advanced by Appellant here in the case of *Mueller v. Walker,* 167 Cal.App.3d 600, 608, 609 where it said:

> In determining whether Civil Code Section 5124 contravenes the due process clause, we must consider inter alia the significance of the state interest served and the importance of retroactive application to effectuate that interest . . . .
>
> We conclude the language of this section as well as its legislative history [footnote omitted] leave no doubt that any property divisions made in reliance upon the *McCarty* decision which became final before the effective date of FUSFSPA are susceptible to redivision as community property so long as action is taken before the scheduled repeal date. This law is a clear expression of legislative intent that recovery of a community property interest in a military pension benefit should not be barred simply because the case by chance falls into the 18-month gap between the effective dates of FUSFSPA and the *McCarty* decision. Section 5124 contemplates persons such as wife here should be entitled to the same protections as those persons whose judgments of dissolution did not become final during that same period.

It is equally clear that Section 5124 does not amount to an impairment of contract in violation of Article I, Section 10 of the Constitution of the United States. The first problem with Appellant's argument in this regard is that Appellant erroneously categorizes the Judgment from which he has appealed as a "contract." The mere fact that the parties may have entered into stipulations in the course of the litigation which led to the judgment does not transform the judgment itself into a contract.

Altogether different standards would apply to the issue of whether the parties to an agreement should be allowed to rescind the agreement or be relieved by the courts from particular terms thereof and on grounds of mistake, surprise or public policy.

But we are dealing here with a judgment, not a contract. Once litigation results in a judgment, the guidelines for modification of that judgment are not the same as would be used to modify the terms of a contract between the parties. Furthermore, the standards used to modify a judgment should not be affected by the fact that the parties to the litigation may have arrived at certain agreements during the course of the litigation. This is especially true where, as here, the court rendering the judgment in a dissolution action specifically reserved jurisdiction over the parties and the division of their assets.

Assuming, arguendo, that the judgment in this action was transformed into a contract between the parties, and that Section 5124 constitutes an impairment of that contract, the fact remains that not every impairment of a contract is unconstitutional. *Home Building and Loan Assoc. v. Blaisdell,* 290 U.S. 398. Whether the impairment is a prohibited one depends on an examination of the nature and purpose of the legislative action which results in the impairment. If the justification is sufficiently compelling, the impairment is not constitutionally prohibited.

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CONCLUSION

The Court should not take jurisdiction of this appeal.

Respectfully submitted,

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